

January 2011

Special points of interest:

- **When is the medical providers claim protected?**
- **To what extent are housing expenses recoverable under the No-Fault Act?**
- **The benefits of joining the No-Fault Network**

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The Michigan No-Fault Newsletter

Dismissal Reversed in Auto Case For Consideration Under *McCormick*

In *Brown v. Blouir*, unpublished opinion per curiam of the Court of Appeals decided October 14, 2010 (Docket No. 291876) the trial court determined that the plaintiff in an automobile negligence case failed to satisfy the "serious impairment of body function" threshold test required by the No-Fault Act to maintain a claim for tort damages under MCL 500.3135.

In this case, the plaintiff was injured in a car accident when the defendant ran a stop sign resulting in a collision.

The Plaintiff suffered a back injury in the matter, including a herniated disc, treatments for which included physical therapy, spinal nerve-block injections, and prescription oral pain relievers.

At the defendant's request, the trial court dismissed the plaintiff's case, concluding that the plaintiff failed to prove that he suffered a "serious im-

pairment of body function" because he failed to satisfy the test set forth in *Kreiner v. Fischer*, 471 Mich 109; 683 NW2d 611 (2004). At the time of the dismissal, *Kreiner* was the controlling case when interpreting § 3135.

While the case was on appeal, the Supreme Court issued its decision in *McCormick v. Carrier* ___ Mich ___ (decided July 31, 2010) which overruled *Kreiner*.

Accordingly, the Court of Appeals in this case reversed the dismissal of the plaintiff's case and instructed the trial court to consider the plaintiff's injuries under the new *McCormick* standard.

The *McCormick* Court stated that § 3135 only requires that "a person's general ability to lead his or her normal life has been affected, not destroyed" and that "there is no quantitative

minimum as to the percentage of a person's normal manner of living that must be affected."

In addition, the Court held that the test is subjective (case by case basis) as opposed to the objective test employed by the *Kreiner* Court.

Moreover, the Court stated that "...the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on 'the person's general ability to live his or her normal life.'"

Thus, the Court reinforced the rule that an injury need not be permanent in order to cross the threshold. Moreover, the *McCormick* Court rejected the "trajectory test" used in *Kreiner*.

Hospital Intervening No-Fault Claim Not Barred By One Year Back Rule

In *Henry Ford v. Farmers*, unpublished opinion per curiam of the Court of Appeals decided November 23, 2010, (Docket No. 293206) the Victoria Jones and Michael Johnson were injured in an automobile accident on May 8, 2007.

Defendant Farmers was appointed by the Assigned Claims Facility to pay no-fault benefits. Jones and Johnson filed their complaint against Farmers for no-fault benefits on April 25, 2008, seeking

payment of medical expenses, wage loss, and other expenses.

On February 25, 2009, Henry Ford Health System (HFHS) filed a motion for leave to intervene in the case as a plaintiff.

HFHS alleged that Jones had been hospitalized as a result of her injuries in the accident and incurred a medical bill of \$15,316.75.

The date of service was May 9, 2007. The trial court granted the motion to inter-

vene in an order dated March 6, 2009. HFHS filed its intervening complaint on April 6, 2009.

On May 11, 2009, Farmers requested that the trial court dismiss HFHS's lawsuit pursuant to MCL 500.3145(1) which bars claims for expenses incurred more than one year before a lawsuit is filed. This is known as the "one year back rule."

The intervening complaint filed by HFHS was

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**Michigan Attorney
Daniel L. Buckfire**

Michigan car accident attorney Daniel L. Buckfire has devoted his career to representing individuals who have suffered serious injuries in car, truck, and motorcycle accidents. He is recognized as a legal expert throughout the State of Michigan on motor vehicles accidents and cases involving Michigan No-Fault Insurance Benefits. Daniel has an undergraduate degree from the University of Michigan School of Business and a law degree from the University of Michigan Law School.

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filed April 6, 2009, nearly two years after the HFHS bill was incurred (May 9, 2007).

In response to the motion to dismiss, HFHS argued that, because Jones and Johnson's initial lawsuit was filed less than one year after the accident, MCL 500.3145(1) did not bar HFHS's recovery.

In other words, for purposes of the one-year-back rule, "the action was commenced" when Jones and Johnson filed their complaint on April 25, 2008.

The trial court agreed with HFHS and denied Farmer's motion. Farmer's appealed. The Court of Appeals rejected

Farmer's argument and held that the HFHS claim related back to the filing of the Jones and Johnson lawsuit.

In other words, the Jones and Johnson lawsuit protected HFHS claim against the one year back rule. This case is distinguishable from the decision in *Detroit Physical Therapy v. Farm Bureau*, unpublished opinion per curiam of the Court of Appeals decided November 9, 2010 (Docket No. 294081), which was discussed in the December, 2010 newsletter.

In this case the medical provider intervened during

the pendency of the claimant lawsuit against the no-fault insurer.

In the *Detroit Physical Therapy* case, the medical provider waited until after the injured claimant's lawsuit had been settled and dismissed before they filed against the no-fault insurer.

Thus, as long as the lawsuit is filed within one year of the particular expense was incurred and the medical provider intervened during the pendency of the lawsuit, the medical provider's claim will be protected.

Court Rejects Allocation Test For No-Fault Accommodation Claims

In *Hoover v Mich Mut Ins Co*, 281 Mich App 617, 630-631 (2008) the plaintiffs built a new home with a wing specifically constructed and designed to accommodate their 25 year old quadriplegic son who was injured in an auto accident when he was two years old.

In addition to the cost of building the home, the plaintiffs claimed from the no-fault insurer the cost associated with the use of the home, such as utilities, homeowners insurance, taxes, etc.

Based on the holding in *Griffith v State Farm Mutual Automobile Ins Co*, 472 Mich 521 (2005) the trial court ruled that 28 percent of the home could be attributed to the son's use and ordered the insurer to pay benefits covering 28 percent of these expenses.

It also ordered the insurer to pay 100 percent of the expenses associated with a backup generator, dumpster, medical pendant, television monitoring system, and elevator inspections.

The Court of Appeals he-

ld that the Michigan Supreme Court's decision in *Griffith, supra* limits a no-fault insurer's liability for an allowable expense to only that portion of the expense that is solely attributable to the accidental bodily injury.

In *Griffith*, the Supreme Court held that the expense of ordinary food provided in a non-institutional setting to a person injured in a motor vehicle accident was not recoverable under the No-Fault Act because the plaintiff did not claim that her husband's diet was "different from that of an uninjured person, that his food expenses [were] part of his treatment plan, or that the costs [were] related in any way to his injuries." *Id.* at 531.

The *Griffith* majority reasoned there was no evidence that the plaintiff's husband required different food than he did before sustaining his injuries. *Id.* at 536.

In *Hoover*, the Court of Appeals examined to what extent housing expenses were recoverable under the No-Fault Act under the test

set forth by *Griffith*. The Court of Appeals held that the trial court's 28% allocation was not legally sound and remanded the case back to the trial court.

In this regard, for each expense, the Court instructed the trial court to allocate not the portion of each particular expense attributable to the sons' usage, but rather that portion of the bill attributable to the injured person's usage that is only occurring because of the injuries, e.g., power to operate Michael's ventilator.

However, the Court affirmed the trial Court's decision ordering the insurer to pay the entire cost of the backup generator, dumpster, medical pendant, television monitoring system, and elevator inspections.

Recently, the Michigan Supreme Court refused to consider the validity of the *Hoover* Court's interpretation of the *Griffith* decision. *Wilcox v. State Farm*, order denying leave, Docket No. 138602, decided December 1, 2010.

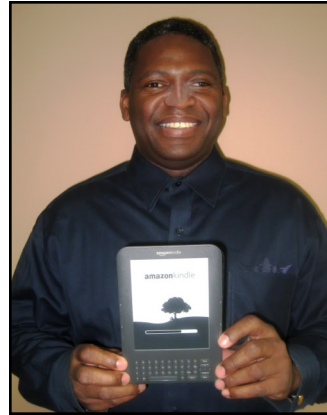
Buckfire Announces Winner of Amazon Kindle Giveaway From 2010 BIA Conference

Buckfire & Buckfire is proud to announce the winner of the Amazon Kindle giveaway at the 2010 BIA Conference, Brufus Lewis!

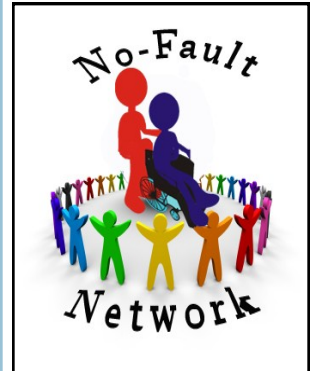
Brufus is part owner of Echols Support Services Incorporated (ESS). ESS was formed to provide residential support services for persons with persistent and non-persistent mental illness and a variety of developmental disabilities. These disabilities include autism, affective disorders, paranoia and closed head injuries.

Everyday we work with individuals who suffer closed head injuries or other mental disabilities due to some type of accident. We are glad to see that the winner of our Amazon Kindle is someone who provides services for those in need of support on a daily basis.

We would like to thank you all for stopping by our table. Please visit our table next year as we will be an exhibitor at the upcoming 2011 Annual BIA Conference as well.



Brufus Lewis and his brand new Amazon Kindle!



Michigan's No-Fault Social Network

Join the No-Fault Network

<http://nofaultnetwork.com>

FREE MEMBERSHIP

- *Make & Receive Professional Referrals*
- *Network With Other Professionals*
- *Publicize Meetings and Events*
- *Find A Support Group*
- *Discover New Service Providers*
- *Promote Your Business or Service For Free*
- *Post Employment Opportunities*
- *Find New Employment*

ASK DAN - The No-Fault Insurance Expert



Q: *My client is receiving attendant care at home from his/her family, how much should be paid by the no-fault insurer?*

Dan: This is a good question, however, there is no simple answer. Under the No-Fault Act, family members are entitled to reimbursement from a no-fault insurer for the "reasonable value" of their services. The question then becomes what is considered reasonable? Many factors need to be considered to determine an attendant care rate, including, but not limited to: the nature and extent of the person's injuries, the nature of the care provided, the skill level necessary to provide the care, geographic location, etc. In addition, Courts have held that rates *charged* by professional agencies for similar services can be considered. However, insurers are now arguing that juries should only consider what the professional agencies *pay* their employees, not the amount they *charge* for the service.

Q: *What is the difference between the Replacement Service expense benefit and Attendant Care?*

Dan: I typically tell my clients that attendant care pertains to services rendered to care for a person and usually involves: caring for their injuries, rehabilitation and recovery. Examples of attendant care include: wound care, bed-transfers, assistance with personal hygiene, assistance with home therapy, supervision, driving to medical appointments, etc. The replacement service expense benefit typically consists of household chores such as cleaning, yard work, cooking, etc. A big difference is that replacement service expenses are limited to 3 years and \$20 per day. As discussed above, attendant care is reimbursed at whatever is deemed reasonable (e.g. 24 hrs per day x \$16 per hour for family provided care) and is a life-

Want to learn more about No-Fault Insurance Laws?

Dan frequently holds seminars for groups of 10 or more on Michigan No-Fault laws and current court cases.

If you have a group of 10 or more and would like to schedule a seminar email Kathryn at Kathryn@buckfirelaw.com or call her at 248-569-4646.

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25800 Northwestern Hwy, Ste. 890
Southfield, MI 48075

Phone: 248-569-4646
Toll: 800-606-1717
Fax: 248-569-6737

E-mail: daniel@buckfirelaw.com

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www.BuckfireLaw.com



Our No-Fault Service Provider Spotlight

Careforward
Southfield, MI 48075

Ph: 248-443-8900

www.careforward.com

This month we spotlight Careforward, a group of experienced, independent case managers who specialize in Auto Injury Case Management. It was founded by Deborah Johnson, RN, CCM, Certified Brain Injury Specialist.

All of Careforward's case managers are RN's with at least 15 years of experience in nursing and only take referrals from providers of care. Careforward coordinates the medical care of individuals who have been catastrophically injured in auto accidents. Their mission is to ease the burden of recovery by providing medical care options, tailoring treatments, and managing the details of a clients care.

Careforward has created the Carnival of Care (COC), which is a day of fun and education for TBI and auto accident survivors, and their care givers. It is free for all attendees. Out of COC, the Careforward Foundation was created, and the Foundation is now in charge of the COC. The proceeds raised from this wonderful event are donated to the Michigan Brain Injury Association.

This year Careforward won the Case In Point Independent Case Management Award for their services. Deborah Johnson, the founder of Careforward, was also awarded the NAWBO top ten business owners award for words of wisdom and the 2010 Brain Injury Association of Michigan Education Public and Awareness Award.



Deborah Johnson
Founder

To nominate yourself or another no-fault provider for the No-Fault Service Provider Spotlight , please e-mail your nomination to Kathryn@BuckfireLaw.com . Our newsletter is read by 1,000 readers every month!